

1997

RUF, INC. a Utah corporation v. Icelandic Investments, INC. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Leslie W. Slaugh; Phillip W. Dyer; Attorney for Appellee.

Blake S. Atkin; Attorneys for Appellants.

Recommended Citation

Brief of Appellant, *RUF, INC. a Utah corporation v. Icelandic investments, inc.*, No. 970691 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/1217

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

RUF, INC., a Utah corporation,)
DONALD M. DUDLEY, an individual,)
and WILLIAM GRUBER, an)
individual,)
Plaintiffs/Appellants,)
v.)
ICELANDIC INVESTMENTS, INC., a)
Utah corporation, ROBERT)
JOHNSON, an individual, and)
VR UTAH, INC. dba VR BUSINESS)
BROKERS, a Utah corporation,)
Defendants/Appellees.)

~~UTAH COURT OF APPEALS~~
BRIEF

**UTAH
DOCUMENT
KFU**

50

.A10

DOCKET NO. 970691-CA

Case No. 970691-CA

Argument Priority 15

BRIEF OF APPELLANT

APPEAL FROM JUDGMENTS OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE STEPHEN L. HENRIOD

Leslie W. Slauch
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84603
Attorneys for Appellees
Icelandic Investments, Inc.
and Robert Johnson

Blake S. Atkin
ATKIN & LILJA, P.C.
136 South Main, Suite 810
Salt Lake City, Utah 84101
Attorneys for Appellants
Donald M. Dudley and Ruf, Inc.

Phillip W. Dyer
318 Kearns Building
Salt Lake City, Utah 84101
Attorney for Appellee
VR Utah, Inc.

FILED

Utah Court of Appeals

JUN 25 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

RUF, INC., a Utah corporation,)
DONALD M. DUDLEY, an individual,)
and WILLIAM GRUBER, an)
individual,)

Plaintiffs/Appellants,)

v.)

ICELANDIC INVESTMENTS, INC., a)
Utah corporation, ROBERT)
JOHNSON, an individual, and)
VR UTAH, INC. dba VR BUSINESS)
BROKERS, a Utah corporation,)

Defendants/Appellees.)

Case No. 970691-CA

Argument Priority 15

BRIEF OF APPELLANT

APPEAL FROM JUDGMENTS OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE STEPHEN L. HENRIOD

Leslie W. Slauch
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84603
Attorneys for Appellees
Icelandic Investments, Inc.
and Robert Johnson

Blake S. Atkin
ATKIN & LILJA, P.C.
136 South Main, Suite 810
Salt Lake City, Utah 84101
Attorneys for Appellants
Donald M. Dudley and Ruf, Inc.

Phillip W. Dyer
318 Kearns Building
Salt Lake City, Utah 84101
Attorney for Appellee
VR Utah, Inc.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED AND STANDARDS OF REVIEW	1
STATEMENT OF JURISDICTION	2
STATEMENT OF THE CASE	3
A. Statement of Facts	3
B. The Nature of the Case And The Course Of Proceedings And Disposition In The Lower Court.	6
1. Claims and Counterclaims - Buyers v. Broker	6
2. Claims and Counterclaims - Buyers v. Sellers.	6
3. Broker's Motion for Summary Judgment.	7
4. Sellers' Motion for Summary Judgment.	9
5. Buyers' Motion for Leave to Amend Complaint	11
6. Buyers' Motion For New Trial.	12
SUMMARY OF ARGUMENTS.	13
ARGUMENT.	16
I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BUYERS' CLAIM OF FRAUD IN THE INDUCEMENT	16
A. TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS THERE WAS SUFFICIENT EVIDENCE SUPPORTING BUYERS' FRAUD IN THE INDUCEMENT CLAIMS AGAINST BOTH SELLERS AND BROKER.	16
1. The Representation That There Were No Pending Litigation Matters And The Failure To Disclose The Existing Litigation Was False And The First Element Was Satisfied.	18

2.	Defendants Knew Their Representation That There Was No Litigation Proceedings Against Seller Were False And The Second Element Was Satisfied	19
3.	The False Representation That There Were No Known Litigation Proceedings Against Seller Was Material And The Third Element Was Satisfied.	19
4.	Defendants' Intent That Buyers Rely On The Representation Was Stipulated And The Fourth Element Was Satisfied.	21
5.	Buyers Reasonably Relied Upon The False Representation And The Fifth Element Was Satisfied.	21
6.	Buyers Suffered Damages As A Result Of The False Representation And The Sixth And Final Element Was Satisfied.	22
B.	TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS THE DEFAULT PROVISION IN THE PURCHASE TRANSACTION AGREEMENT WAS NEITHER ENFORCEABLE NOR APPLICABLE.	23
1.	The Default Provision Is Not Enforceable As The Agreement Was Induced By Fraud	24
2.	The "Default" Could Not Be Cured And The Default Provision Is Inapplicable	25
3.	The Default Provision Does Not Provide Protection For Sellers As They Had Notice Of The Default.	26

II.	THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BUYERS' CLAIM OF NEGLIGENT MISREPRESENTATION.	27
A.	TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS THERE WAS SUFFICIENT EVIDENCE SUPPORTING BUYERS' NEGLIGENT MISREPRESENTATION CLAIMS AGAINST BOTH SELLERS AND BROKER.	27
1.	Sellers And Broker Had A Pecuniary Interest In The Purchase Transaction And The First Element Was Satisfied.	28
2.	Sellers And Broker Were In A Superior Position To Know About The Litigation And The Second Element Was Satisfied	28
3.	Sellers And Broker Negligently Made False Representation And The Third Element Was Satisfied.	28
4.	Sellers and Broker Expected Buyers To Rely And Act On The Representation And The Fourth Element Was Satisfied.	28
5.	Buyers Reasonably Relied On The Representation And The Fifth Element Was Satisfied.	29
6.	Buyers Suffered Loss As A Result Of The False Representation And The Sixth And Final Element Was Satisfied.	29
III.	THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON SELLERS' COUNTERCLAIM FOR BREACH OF CONTRACT BASED ON THE FRAUDULENTLY INDUCED PURCHASE TRANSACTION AGREEMENT.	29
IV.	THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BROKERS' COUNTERCLAIM AND ENFORCING AN INDEMNITY CLAUSE INDUCED BY FRAUD	31
V.	THE TRIAL COURT ERRED IN DENYING BUYERS' MOTION TO AMEND TO ADD CLAIM OF RESCISSION	33

VI. THE TRIAL COURT ERRED IN DENYING BUYERS' MOTION FOR NEW TRIAL	35
CONCLUSION AND RELIEF SOUGHT.	36

ADDENDUM

Minute Entry of Third Judicial District
Court, Honorable Stephen L. Henriod,
dated February 26, 1997. ADDENDUM A

Bench Decision of Third Judicial District
Court, Honorable Stephen L. Henriod,
dated August 4, 1997 ADDENDUM B

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<u>American Scale Mfg. Co. v. Zee,</u> 235 P.2d 361, 363 (Utah 1951).	24, 30
<u>Associated Factors, Inc. v. Rainbow</u> <u>Custom Fibers, et al.,</u> Civil No. 87-02843, pending in the Third District Court of Salt Lake County	4
<u>Bekins Bar V Ranch v. Huth,</u> 664 P.2d 455, 464 (Utah 1983).	34
<u>Billings v. Union Bankers Ins. Co.,</u> 819 P.2d 803 (Utah 1991)	23
<u>Blue Cross & Blue Shield v. State,</u> 779 P.2d 634 (Utah 1989)	2, 3, 17
<u>Christenson v. Commonwealth Land Title</u> <u>Ins. Co.,</u> 666 P.2d 302, 305 (Utah 1993)	27
<u>Conder v. A.L. Williams & Assocs., Inc.,</u> 739 P.2d 634, 639 (Utah Ct. App. 1987)	24, 30
<u>Dugan v. Jones,</u> 615 P.2d 1239, 1247 (Utah 1980).	19, 24, 30, 32, 35
<u>Ellis v. Hale,</u> 373 P.2d 382 (1962).	32
<u>Knudsen Music Co. v. Mastrson,</u> 121 Utah 252, 256, 240 P.2d 973, 975 (1952).	31
<u>Kranz v. Holt,</u> 819 P.2d 352 (Utah 1991)	23
<u>Mecham v. Benson,</u> 590 P.2d 304, 307-308 (Utah 1979).	24, 30
<u>Neiderhauser Builders. & Dev. Corp. v.</u> <u>Campbell,</u> 824 P.2d 1193 (Utah Ct. App. 1992).	2, 3, 17
<u>Ong Int'l (USA), Inc. v. 11th Ave. Corp.,</u> 850 P.2d 447, 452 (Utah 1993).	25, 32
<u>Pace v. Parrish,</u> 122 Utah 141, 247 P.2d 273 (1952).	17

<u>Perkins v. Coombs,</u> 769 P.2d 269, 271 (Utah Ct. App. 1988)	24, 30, 35
<u>S & F Supply Co. v. Hunter,</u> 527 P.2d 217, 221 (Utah 1974).	19
<u>Taylor v. Gasor Inc.,</u> 607 P.2d 293 (Utah 1990)	17
<u>Thornock v. Cook,</u> 604 P.2d 934 (Utah 1979).	17

STATUTES AND RULES

Utah Code Ann. § 78-2-3(j)(1997).	2
Utah R. App. P. 11.	3
Utah R. Civ. P. 15(a)	34
Utah R. Civ. P. 56(c)	17

QUESTIONS PRESENTED AND STANDARDS OF REVIEW

The following questions are presented in this appeal:

1. Did the District Court err in granting summary judgment in favor of Sellers on Buyers' claims for fraud in the inducement and negligent misrepresentation in the business purchase transaction when Sellers warranted and represented to Buyers in the purchase contract:

With knowledge, and buyer may rely on the same
to enter into this transaction. . . . That
there are no known . . . litigation
proceedings against seller . . . ,

and Sellers admitted they knew of pending litigation at the time of sale and intentionally failed to disclose that fact to Buyers?

2. Did the District Court err in granting summary judgment in favor of Broker on Buyers' claims for fraud and negligent misrepresentation in the business purchase transaction when there was sufficient evidence for a jury to conclude that Broker induced Sellers to not disclose pending litigation and to warrant and represent "[t]hat there are no known. . . litigation proceedings against the seller"?

3. Did the District Court err in granting summary judgment on Sellers' counterclaim for breach of the purchase contract when Sellers represented to Buyers in the purchase contract:

With knowledge, and buyer may rely on the same
to enter into this transaction. . . . That
there are no known . . . litigation
proceedings against seller . . . ,

and Sellers admitted they knew of pending litigation at the time of sale and intentionally failed to disclose that fact to Buyers?

4. Did the District Court err in granting summary judgment on Broker's counterclaim for attorney fees pursuant to indemnity provision in the purchase contract when there was evidence that Broker knew about the existence of pending litigation in violation of the express representation in the purchase contract and induced the Sellers not to disclose that fact to Buyers?

In reviewing this appeal from the lower court's granting of summary judgment motions against Buyers, all facts and reasonable inferences therefrom are to be drawn in Buyers' favor, and the trial court's ruling is accorded no deference. E.g., Blue Cross & Blue Shield v. State, 779 P.2d 634, 636-637 (Utah 1989); Neiderhauser Builders. & Dev. Corp. v. Campbell, 824 P.2d 1193, 1194 (Utah Ct. App. 1992).

STATEMENT OF JURISDICTION

Appellants Donald M. Dudley and Ruf, Inc. appeal from final judgments of the Third Judicial District Court of Salt Lake County, Honorable Stephen L. Henriod, entered on motions for summary judgment in favor of Appellees Iceland Investment, Inc., Robert Johnson, and VR Utah, Inc. d/b/a VR Business Brokers. This Court has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2-3(j) (1997).

STATEMENT OF THE CASE

A. Statement of Facts.¹

1. On or about September 12, 1990 Appellants Ruf, Inc. as buyer and Donald M. Dudley as guarantor (hereinafter "Buyers") agreed to purchase the assets of a business from Appellee Icelandic Investments, Inc. f/k/a USA Swings for a total purchase price of \$82,546.00 (hereinafter "Purchase Transaction"). [R2 & 10-60]²

2. Appellee Robert Johnson was the president of Icelandic Investments, Inc. f/k/a USA Swings (hereinafter collectively "Sellers"). [R1, 21 & 80]

3. Defendant VR Utah, Inc. d/b/a VR Business Brokers (hereinafter "Broker") is a brokerage firm which brokered the transaction between the buyers and sellers. [R1-2 & 71] Broker received \$10,452 in commission at the closing of the Purchase Transaction. [R434 at ¶ 10]

4. The Purchase Transaction was memorialized in the Agreement for Sale of Assets, dated September 12, 1990 (hereinafter "Purchase Transaction Agreement") [R10-60] which was signed by, inter alia, Icelandic Investments, Inc., Ruf, Inc., Donald M. Dudley, and Robert Johnson, individually. [R21]

¹ As this is an appeal from the lower court's granting of summary judgment motions against Buyers, all facts and reasonable inferences therefrom are to be drawn in Buyers' favor. E.g., Blue Cross & Blue Shield v. State, 779 P.2d 634, 636-637 (Utah 1989); Neiderhauser Builders. & Dev. Corp. v. Campbell, 824 P.2d 1193, 1194 (Utah Ct. App. 1992).

² All citations are to the record as indexed by the Clerk of the Third Judicial District Court pursuant to Rule 11 of the Utah Rules of Appellate Procedure.

5. In connection with the Purchase Transaction it was expressly represented:

The SELLER warrants and represents to BUYER with knowledge, and BUYER may rely on the same to enter into this transaction each and all of the following:

. . . 5. That there are no known governmental, administrative, or litigation proceedings against SELLER, which have arisen in connection with its conduct of the business.

[R4, 15-16, 436] (emphases added)

6. This representation was material to Buyers because, inter alia, their financing source for purchase and operation of the business was contingent on there being no litigation against the business. [R5-7, 853-854, 864-870, 1167-1172]

7. This representation was false. Before entering into this Purchase Transaction, Seller Icelandic had been made a party to litigation brought by Associated Factors, Inc. and captioned Associated Factors, Inc. v. Rainbow Custom Fibers, et al., Civil No. 87-02843, pending in the Third District Court of Salt Lake County (hereinafter "Associated Factors Lawsuit"). [R435, 742, 830, 1565] Associated Factors was seeking to recover from Seller Icelandic the sum of \$88,798.50 plus punitive damages, interest and attorney's fees. [R438]

8. Appellee Johnson knew about the Associated Factors Lawsuit pending against the Seller Icelandic and told Broker about the litigation prior to the Purchase Transaction. [R435-436, 742 at n. 1, 831, 1553]

9. Neither Seller Icelandic nor Mr. Johnson disclosed the pendency of the Associated Factors Lawsuit to Buyers and Buyers were not aware of the lawsuit at the time of the Purchase Transaction and the execution of the Purchase Transaction Agreement. [R4, 439, 742, 830]

10. Broker did not disclose the pendency of the Associated Factors Lawsuit to Buyers and, in fact, Broker persuaded the Seller Icelandic and Appellee Johnson not to disclose the pendency of the litigation. [R742, 831, 1200-1201, 1248-1250, 1360-1363]

11. Buyers did not learn of the pendency of the litigation until the following year. [R743] On October 10, 1991 Buyer Ruf, Inc. was named in an amended complaint by Associated Factors seeking recovery from Ruf in the amount of \$88,798.50 plus punitive damages, interest and attorney fees. [R831, 864-894] The amount sought in this litigation was more than the entire purchase price in the Purchase Transaction Agreement. [R10-12]

12. Revelation and disclosure of the lawsuit caused Buyers to lose their funding source, and a funding commitment of \$150,000.00. [R5, 853-856, 864-869]

13. Upon learning they had been defrauded with regard to litigation against the business, the Buyers on September 23, 1991 sent Sellers a written notice of rescission of the Purchase Transaction. [R438, 628, 868]

14. On November 11, 1991 Buyer Ruf, Inc., by and through its counsel, filed an Answer to the Associated Factors' Complaint. [R868, 895-899]

15. In June 1992, eight months after the rescission demand and more than a year and a half after the purchase transaction, the Associated Factors Lawsuit was settled. [R744, 900-902]

B. The Nature of the Case And The Course Of Proceedings And Disposition In The Lower Court.

1. Claims and Counterclaims -- Buyers v. Broker.

On July 21, 1993, Buyers brought this action against Broker asserting causes of action for Fraudulent Inducement to Contract and Negligent Misrepresentation. [R1-9] Broker counterclaimed against Buyers asserting that Buyers breached the indemnity provision contained in paragraph XX of the Purchase Transaction Agreement. [R74-75, 82-84] Buyers, in their Answer to Broker's counterclaim on September 22, 1993, affirmatively asserted as their third defense:

Any indemnification agreement signed by [Buyers] is subject to rescission given the conduct of [Sellers and Broker] as alleged in the Complaint, which allegations are hereby incorporated by reference as a further affirmative defense. [R96]

2. Claims and Counterclaims -- Buyers v. Sellers

Buyers also brought claims against Sellers for Fraudulent Inducement to Contract, Negligent Misrepresentation and Breach of Contract. [R1-9] Sellers in turn counterclaimed against Buyers for \$46,545.74, the unpaid portion of the sales price under the

Purchase Transaction Agreement. [R79-84] In their Answer to Sellers' counterclaim Buyers' again affirmatively asserted the following:

The Note which is the subject of the Counterclaim is subject to rescission given the conduct of the [Sellers and Broker] as alleged in the Complaint which is incorporated by this reference. [R93]

3. Broker's Motion for Summary Judgment.

On October 18, 1995, Broker moved the trial court for summary judgment on the grounds that Buyers expressly assumed by contract the risk of their damages, that Buyers released Brokers as to liability and that Buyers agreed not to sue Brokers for any damages resulting from the purchase of the business. [R234-35] Buyers responded to the motion for summary judgment and set forth evidence and argument that: 1) Broker was liable to Buyers for negligent misrepresentation; 2) Broker was liable to Buyers for fraudulent inducement; 3) The contract provision relied on by Broker should not be applied to exculpate Broker from its own fraud; and 4) The contract is voidable and Buyers were entitled to rescission. [R431-449] Broker's three-page argument filed on reply argued that Buyers failed to show a prima facie case of intentional or negligent misrepresentation and raised, for the first time, the argument that Buyers have not shown any damages to support their claims. [R495-500]

On February 24, 1997, Broker's Motion for Summary Judgment came on for hearing before the trial court. On February 26, 1997 the trial court issued its Minute Entry wherein it granted

Broker's Motion for Summary Judgment. In granting the Broker's summary judgment the trial court ruled in its Minute Entry³ as follows:

[Broker's] Motion for Summary Judgment is based primarily on paragraph XX of the contract between the parties. Article XX says in pertinent part that buyer is relying solely on buyer's inspection of the business and the representations of the seller, and not on [broker's] with regard to the prior operating history of the business, the value of the assets being purchased, and all other material facts of seller in making this offer. The paragraph goes on to state that the broker hasn't verified and will not verify any representations of seller and if any representation should be untrue, buyer agrees to look solely to seller for relief, and to indemnify [broker] and hold broker harmless in connection with any losses or damages caused to buyer.

In its response, the [buyer] seems to ignore the foregoing contractual provision, claiming that the [buyer] would not have entered into the contract, but for negligent or fraudulent misrepresentations by the seller and [broker], and that therefore [buyer] is entitled to rescission and the terms of the contract don't matter.

The [buyer's] arguments have no merit for several reasons. The agreement was signed by all the parties. The [buyer] testified in his deposition that he read the agreement thoroughly and understood it. [Buyer], through paragraph XX, expressly assumed the risks regarding representations or misrepresentations of seller. By this provision, [buyer] expressly relieved [broker] of any legal duties arising from the described conduct, i.e., seller's representations or misrepresentations.

. . . The [buyer] has simply failed to [show there is a genuine issue for trial]. With respect to the elements of fraudulent misrepresentation, there is no factual averment from the [buyer] establishing even arguable evidence of each of those elements. The same is true with respect to the elements of negligent

³ The Minute Entry is quoted herein as the trial court's Order, signed April 25, 1997, simply provides that "Defendant [Broker's] Motion for Summary Judgment is granted for the reasons set forth, in the detail, [sic] in the Court's Minute Entry dated February 26, 1997." [R693-695]

misrepresentation. [Buyer] has also failed to provide any evidence of damages.

[Buyer's] action against [Broker] is barred by the terms of the contract, and [Buyers] have failed to meet their burden in response to [Broker's] Motion for Summary Judgment.

[R603-607]⁴

4. Sellers' Motion for Summary Judgment.

On May 9, 1997, Sellers moved the trial court for summary judgment seeking dismissal of Buyers' claims against Sellers and judgment on Sellers' counterclaim. [R739-740] Sellers' Motion, while conceding the misrepresentation and nondisclosure of the pending litigation, argued they were entitled to summary judgment on two grounds: (1) They were not provided with a written notice of default with a 30-day opportunity to cure as set forth in Article VIII of the Purchase Transaction Agreement; and (2) There was no damage to Buyers resulting from the misrepresentation. [R740-749]

In opposition to Sellers' summary judgment motion, Buyers submitted the affidavits of Donald M. Dudley and Wesley C. Dudley. [R864-870 & 853-857, respectively]. Donald Dudley testified, inter alia, that the lack of outstanding litigation against Sellers was extremely important to him and that he would not have entered into the Purchase Transaction Agreement or signed the promissory notes if that warranty was not in the agreement. [R866-867 at ¶¶ 4-6 & 12] He testified further that upon disclosing the existing litigation against the business to Wesley Dudley, who was financing

⁴ Attached as Addendum "A".

the purchase and operation of the business and was Donald Dudley's only viable source of financing, Wesley Dudley refused to advance any further funds to finance the purchase or operation of the business and no other financing was available. [R866-867 at ¶¶ 9 & 10] Likewise, Wesley Dudley testified that he had required, as a condition to financing the business, that there be no litigation against the business. [R855 at ¶ 8] He further testified that upon learning of the pending litigation against the business he would not loan any additional funds to Donald Dudley, and had there not been any litigation he was ready, willing and able to loan the additional \$150,000 in capital he had committed to loan for the purpose of operating and expanding the business. [R855 at ¶¶ 6-10]⁵

On October 20, 1997 the trial court entered an Order granting Sellers' summary judgment motion dismissing Buyers' complaint and granting judgment against Buyers on Sellers' counterclaim in the amount of \$89,006.31. [R1060-1062] While the trial court's written order does not explain or set forth the court's reasoning or basis for its ruling, the court's ruling from the bench on August 4, 1997 explained it as follows:

⁵ Although Sellers never objected to the affidavits, Broker moved to strike these affidavits to the extent they pertained to the motion for new trial discussed below arguing that Buyers were "unreasonably dilatory in preparing and submitting these Affidavits". [R924-929] There was no evidentiary challenges to the affidavits or their contents. On August 6, 1997 the trial court granted this motion and struck the affidavits as they pertain to the motion for new trial. The trial court did not, however, strike them with respect to Sellers' Motion for Summary Judgment and no such motion was ever made. [R1021-1025]

And [Sellers'] motion for summary judgment is granted.

And I think this was explained very well by Mr. Slaugh. When a party makes a motion for summary judgment and it is properly supported, the burden on the responding party is a lot greater than what [Buyers] have met in their response.

When I said wishy-washy, Mr. Silvestrini -- and that's really what I was talking about -- Mr. Slaugh talked about clear and convincing evidence. It is clear to me from reading the affidavits and deposition that Mr. Dudley did not rely on it. He likes to talk about reliance, but he's got to bring to court admissible facts showing that we've got a case to try. . . . And the fact [sic] that the [Buyers] needed to bring to this Court to survive these motions simply were never even proffered. And that's absolutely true with the damage issue. That was raised. That was before the Court. And there hasn't been even an intimation regarding the kind of specific types of damages that would have to be raised again to survive this motion. [Buyers have] simply failed to make even a prima facie case of fraudulent inducement. It takes more than just evidence in the record.

I think the contract provision regarding notice and cure is essential to any analysis of this case, and it is also clear that the [Buyers] completely ignored that provision. That provision was there for exactly this kind of case. And I think that cut right to the core for the argument for fraudulent inducement. Why is this provision in the contract if the parties didn't acknowledge that there are sometimes things misrepresented, omitted or even things that people don't know about that are not as everybody thought they were when they put together the list of representations at the start of a contract?

[R1004] (emphases added)⁶

5. Buyers' Motion for Leave to Amend Complaint.

On February 25, 1997, prior to the Sellers' Motion for Summary Judgment and prior to the trial court's decision granting Broker's Motion for Summary Judgment, Buyers moved the trial court

⁶ Attached as Addendum "B".

for leave to amend their complaint to add a claim for relief entitled "rescission and restitution". [R518-520, 586-602] This proposed amendment was to clear up any confusion regarding the fact that Buyers were seeking rescission as previously expressed in their letter dated September 23, 1991 which demanded rescission of the transaction, [R628] and as expressly pleaded at the outset of this litigation in defense to the counterclaims of both Sellers and Broker. [R93 & 96] The rescission claim was based on the same factual and legal basis as those contained in the initial complaint and, in fact, the factual allegations in the amended complaint were identical to those in the initial complaint. [592-602]

On September 8, 1997 the trial court denied Buyers' Motion for Leave to Amend Complaint "because it is untimely, is prejudicial to the defendants, and [Buyers] have offered no excuse for the delay in filing the same." [R1021-1024]

6. Buyers' Motion For New Trial.

On May 5, 1997, Buyers filed a "Motion for New Trial" asking the court to reconsider its ruling granting Broker's Motion for Summary Judgment. [R712-714] The Motion was based on the fact that there were material issues of disputed fact which precluded the entry of summary judgment and the trial court, as a matter of law, committed error in its ruling granting Broker's summary judgment motion. [R715-724] On September 8, 1997 the trial court denied Buyers' Motion for New Trial "on the grounds that this Court's Order of Summary Judgment in favor of [Broker] is, and was, correct and the Court made no error in law by granting [Broker's]

Motion for Summary Judgment." [R1021-1025] The court further awarded Broker \$14,229.33 in attorney's fees under its indemnity counterclaim. [R1021-1025]

SUMMARY OF ARGUMENTS

The trial court erred in granting summary judgment against Buyers on their claims of fraud in the inducement and negligent misrepresentation against Sellers and Broker. There was record evidence establishing each of the elements of these claims against Sellers and Broker. More particularly, there was a material representation made by Sellers, with knowledge and at the insistence of the Broker (who failed to disclose the same), which was relied upon by Buyers and which caused substantial damage to Buyers. Accordingly, summary judgment should not have been granted on Buyers' claims against Sellers and Broker and the ruling should be reversed.

The trial court further erred in granting summary judgment against Buyers on their claims against Sellers by improperly ruling that Buyers failed to comply with a Default provision which required that notice of a default and an opportunity to cure be given. It was error as the Default provision, which was obtained by fraud, was subject to rescission and therefore unenforceable. Moreover, even if enforceable the provision was inapplicable as the "default" was the existence of litigation against the Seller at the time of the Purchase Transaction, and such default could not be cured. Finally, Sellers actually knew of the default and yet the litigation continued

against the business (and later also Buyer Ruf, Inc.) for more than a year and a half after the Purchase Transaction Agreement was entered, and eight months after Buyers' written notice of rescission detailing the fraudulent representation of Sellers. Thus, the unenforceable Default provision could not provide a basis for judgment in Sellers' favor as a matter of law or a matter of fact and the trial court's ruling should be reversed.

The trial court further erred in granting summary judgment against Buyers on Sellers' counterclaim seeking the balance of the purchase price owing under the fraudulently induced Purchase Transaction Agreement. The evidence establishing fraud in the inducement committed by Sellers and Broker subjects the Agreement to rescission and negates Buyers' obligation to pay the balance under the Agreement (and entitles Buyers to be restored to the position they occupied prior to the Agreement). It was error, therefore, for the court to grant summary judgment on Sellers' counterclaim when the contract being enforced was induced by fraud.

The trial court also erred in granting summary judgment against Buyers on Brokers' counterclaim for indemnification under the fraudulently induced Purchase Transaction Agreement. Utah law, as a matter of public policy, does not allow a party to contract for immunity from its own fraud and any such provision is void. Moreover, the provision is contained in the Purchase Transaction Agreement which is also unenforceable as a result of being fraudulently induced as discussed in the preceding paragraph. The

trial court's summary judgment in favor of Broker should therefore be reversed.

Next, the trial court erred in refusing to allow Buyers to amend their complaint to clear up any confusion regarding the fact that Buyers were seeking rescission as previously expressed in their letter to Sellers at the time the fraud was discovered, and as asserted as affirmative defenses to the counterclaims of both Sellers and Broker. The amendment, which was proposed prior to Sellers' summary judgment motion and prior to the court's ruling on Broker's summary judgment motion, added no new factual issue or legal issues; therefore, the trial court's denial of Buyers' motion for leave to amend was error and that decision should be reversed.

Finally, the trial court erred in denying Buyers' Motion for New Trial which sought reconsideration of the trial court's summary judgment ruling in favor of Broker which was contrary to law and which was based on an issue first raised by Broker in its reply memorandum to which Buyers had no opportunity to respond. Given the trial court's legal error and the existence of factual issues precluding the entry of summary judgment, the trial court should have granted Buyers' Motion for New Trial and reconsidered its decision.

In sum, the trial court erred in granting summary judgment on Buyers' claims for fraud in the inducement and negligent misrepresentation against both Sellers and Broker. Moreover, given the fraudulently induced agreement, the trial court

also erred in granting summary judgment against Buyers on the counterclaims of Sellers and Broker, both of which were based on the fraudulently induced agreement. Accordingly, the trial court's rulings granting summary judgment in favor of Sellers and Broker should be reversed and the case remanded for further proceedings.

ARGUMENT

The trial court erred in dismissing Buyers' causes of action for against Sellers and Broker for fraud in the inducement and negligent misrepresentation as there was more than ample evidence in the record to create genuine issues of fact on each element of those claims. The trial court further erred in granting summary judgment against Buyers on the counterclaims of Sellers and Broker seeking to enforce the written contract given that Buyers had valid defenses to the contract which included fraud in the inducement and the right to rescission. Accordingly, the trial court's orders entering summary judgment against Buyers should be reversed and the case remanded.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BUYERS' CLAIM OF FRAUD IN THE INDUCEMENT.

A. TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS THERE WAS SUFFICIENT EVIDENCE SUPPORTING BUYERS' FRAUD IN THE INDUCEMENT CLAIMS AGAINST BOTH SELLERS AND BROKER.

Buyers' claim of fraud in the inducement asserted against both Sellers and Broker was improperly dismissed by the trial court as all elements of a fraud in the inducement claim were either

undisputed or were established by substantial record evidence making the grant of summary judgment inappropriate in this case.

Summary judgment is proper only if, based on the undisputed evidence, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. E.g., Utah R. Civ. P. 56(c); Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979). Moreover, all evidence and inferences to be drawn from the evidence are considered in a light most favorable to the non-moving party, the Buyers in this case, and the trial court's ruling is accorded no deference. E.g., Blue Cross & Blue Shield v. State, 779 P.2d 634, 636-637 (Utah 1989); Neiderhauser Builders. & Dev. Corp. v. Campbell, 824 P.2d 1193, 1194 (Utah Ct. App. 1992).

The Buyers must prove the following six elements to establish their fraud in the inducement claim:

1. That the defendant made a false or misleading statement; and
2. That the defendant either knew the statement was false or misleading, or that the defendant made it with reckless disregard for its truth or falsity; and
3. That the statement was of material fact; and
4. That the defendant made the statement with the intent that the plaintiff would rely on the false or misleading representation; and
5. That the plaintiff reasonably relied on the false or misleading representation; and
6. That the plaintiff suffered damages as a result of relying on the false representation.

E.g., Taylor v. Gasor, Inc., 607 P.2d 293, 294 (Utah 1990); Pace v. Parrish, 122 Utah 141, 247 P.2d 273, 274-275 (1952).

The record evidence before the trial court clearly demonstrated the Buyers' ability to establish each of these elements against both Sellers and Broker and summary judgment was improper.

1. The Representation That There Were No Pending Litigation Matters And The Failure To Disclose The Existing Litigation Was False And The First Element Was Satisfied.

There can be no dispute about the Sellers' false representation. The Sellers expressly represented in the Purchase Transaction Agreement as follows:

The seller . . . represents to buyer . . .
that there are no known . . . litigation
proceedings against seller. . . .

This was a statement of a presently existing material fact which was false because, as Sellers admitted in their pleadings before the trial court, the Associated Factors Lawsuit was pending against the Seller at the time the Purchase Transaction Agreement was executed. Additionally, Sellers admitted this false representation in their Memorandum in support of their Motion for Summary Judgment: "[Sellers] did not disclose to [Buyers] the pendency of the Associated Factors Lawsuit." [R742]

With respect to the Broker, the evidence before the trial court further established that Appellee Johnson knew about the Associated Factors Lawsuit pending against the Seller Icelandic and told Broker about the litigation prior to the Purchase Transaction. [R435-436, 742 at n. 1, 831, 1553] Thereafter, the Broker not only failed to disclose to Buyers the pendency of the Associated

Factors Lawsuit⁷ but also persuaded the Sellers not to disclose the pendency of the litigation. [R742, 831, 1200-1201, 1248-1250, 1360-1363]

2. Defendants Knew Their Representation That There Was No Litigation Proceedings Against Seller Was False And The Second Element Was Satisfied.

Both the Sellers and the Broker knew the representation in the Purchase Transaction Agreement that there were no known litigation proceedings against the Seller was false. The Sellers were parties to the litigation and admitted knowing the litigation was pending at the time of the Purchase Transaction Agreement. Further, the Broker had knowledge as the evidence established that the Sellers disclosed the Associated Factors Lawsuit to the Broker who promptly induced them not to disclose it to the buyers. [R742, 831, 1200-1201, 1248-1250, 1360-1363]

3. The False Representation That There Were No Known Litigation Proceedings Against Seller Was Material And The Third Element Was Satisfied.

A fact is material if it is "something which a buyer or seller of ordinary intelligence and prudence would think to be of some importance in determining whether to buy or sell." S & F Supply Co. v. Hunter, 527 P.2d 217, 221 (Utah 1974). Obviously pending litigation against an entity one is purchasing is something

⁷ Under Utah law, a real estate agent owes a duty to prospective purchasers to act honestly, ethically and competently, and is answerable at law for breaches of his or her statutory duty to the public. E.g., Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980) (citing Elder v. Clawson, 14 Utah 2d 279, 373 P.2d 802, 805 (1962)). Thus, real estate agents hired by vendors are liable to purchasers under the torts of fraud and negligent misrepresentation. Id.

which an ordinary buyer would deem to be important and is, thus, material. Moreover, the parties stipulated in the Purchase Transaction Agreement that the representation was material by expressly agreeing that "buyer may rely on the same to enter into this transaction. . . ." Thus, by definition the representation was material.

The evidence before the trial court further established the materiality of the misrepresentation by showing the following:

- (1) That the lack of outstanding litigation against Sellers was extremely important to Buyers and that they would not have entered into the Purchase Transaction Agreement or signed the corresponding promissory notes if that warranty was not in the agreement [R866-867 at ¶¶ 4-6 & 12];
- (2) That when the Buyers disclosed the existing litigation against the business to Wesley Dudley, who was financing the purchase and operation and was Buyers' only viable source of financing, Wesley Dudley refused to advance any further funds to finance the purchase or operation of the business and no other financing was available [R866-867 at ¶¶ 9 & 10];
- (3) That the Buyers' financing source had required, as a condition to financing the purchase and operation of the business, that there be no litigation against the business [R855 at ¶ 8]; and
- (4) That upon learning of the pending litigation against the business Buyers could not obtain the additional \$150,000 in funding which Buyers' funding source was ready, willing and able to loan had the contingency that there be no litigation against the Seller be satisfied. [R855 at ¶¶ 6-10]

4. Defendants' Intent That Buyers Rely On The Representation Was Stipulated And The Fourth Element Was Satisfied.

The parties expressly agreed in the Purchase Transaction Agreement that "BUYER may rely on the [representation] to enter into this transaction. . . ." [R15-16] Moreover, it was fully expected Buyers would rely on the representation otherwise there was no reason to withhold the information from Buyers. Thus, it was contemplated and even expressly intended that Buyers rely on the representation that there was no litigation pending against Seller at the time of the Purchase Transaction.

5. Buyers Reasonably Relied Upon The False Representation And The Fifth Element Was Satisfied.

There is record evidence that the lack of outstanding litigation against Sellers was extremely important to Buyers and that they would not have entered into the Purchase Transaction Agreement or signed the promissory notes if that warranty was not in the agreement. [E.g., R432-440, 866-867 at ¶¶ 4-6 & 12] In other words, the Buyers actually relied upon the representation.

The evidence and circumstances of this case further show that the reliance was reasonable. As discussed above, the parties expressly stipulated that Buyers could rely on the representation indicating that they contemplated that such reliance would occur and would be reasonable. Moreover, representations that there are no pending lawsuits are typically included in purchase contracts and material information upon which a reasonable buyer would (and should) rely. Finally, the fact that the Sellers and Broker carefully concealed the litigation from the Buyers so the purchase

would take place erases any question that Buyers' reliance was reasonable.

6. Buyers Suffered Damages As A Result Of The False Representation And The Sixth And Final Element Was Satisfied.⁸

Buyers were clearly damaged by the existence of the Associated Factors Lawsuit pending against the entity purchased by Buyers. The fundamental damage arises from the simple fact that an entity embroiled in litigation is worth less than the entity Buyers thought they were purchasing based on Defendants' representation, namely an entity not involved in litigation. Under no circumstances would the value of these two entities be the same and, as a result, Buyers were damaged as they received an entity worth less because of the litigation.

Buyers were further damaged as it is undisputed that, as shown by the evidence, Buyers lost their funding source as a direct and proximate result of this fraud. This evidence established that Buyers' financing for the Purchase Transaction was contingent on there being no pending litigation against the Seller and when it came to light that there was pending litigation despite the representation to the contrary, the lender withdrew future funding.

[R5-7, 853-854, 864-870, 1167-1172] Further, Buyers incurred

⁸ This element of Buyers' fraud in the inducement claim is not at issue with respect to the Broker's Motion for Summary Judgment as the issue of damages was not raised by Broker until its reply memorandum. Accordingly, the damages element must be presumed satisfied with respect to Broker's Motion for Summary Judgment. In any event, the evidence showing that Buyers were damaged by the misrepresentation satisfies the damages element with respect to both Broker and Sellers.

damage when, in September, 1991, Buyer Ruf, Inc. was added as a defendant in the Associated Factors Lawsuit and had to retain counsel to defend itself in that substantial litigation.⁹ [R437-438, 830]

Clearly the foregoing demonstrates there was sufficient evidence of damages to preclude summary judgment. In order to avoid summary judgment a party need not establish its damage claim with precision, but need only demonstrate they can produce evidence that would reasonably support a finding in their favor on this issue. Billings v. Union Bankers Ins. Co., 819 P.2d 803, 805 (Utah 1991); Kranz v. Holt, 819 P.2d 352, 353 & 356 (Utah 1991). Thus, the trial court's entry of summary judgment against Buyers on their fraud in the inducement claim was error.

B. TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS THE DEFAULT PROVISION IN THE PURCHASE TRANSACTION AGREEMENT WAS NEITHER ENFORCEABLE NOR APPLICABLE.

In granting Sellers' Motion for Summary Judgment, the trial court's decision centered on the Default provision set forth as Article VIII of the Purchase Transaction Agreement.¹⁰ The

⁹ The Associated Factors Lawsuit was substantial litigation as Associated Factors was seeking to recover from Buyer Ruf, Inc. the sum of \$88,798.50 plus punitive damages, interest and attorney's fees. [R474 & 478] The amount sought in the Associated Factors Lawsuit exceeded the entire purchase price under the Purchase Transaction Agreement. [R10-12]

¹⁰ That provision provides in pertinent part:
In the event any party to this Agreement defaults on any term or provision incorporated herein, including any provision of any Exhibit attached hereto, the nondefaulting party shall give the defaulting party a written notice requiring that such default be cured within thirty (30) days after receipt of said written notice. . . . After such period, the nondefaulting parties may

trial court erred in basing its ruling on this Default provision and finding that Buyers had no remedy against Sellers because they did not provide written notice to Sellers and allow them to cure the defect. The court's ruling in this regard is flawed both legally and factually.

1. The Default Provision Is Not Enforceable As The Agreement Was Induced By Fraud.

As a matter of law, a contract induced by a fraudulent misrepresentation of existing material fact is subject to rescission at the election of the defrauded party. E.g., American Scale Mfg. Co. v. Zee, 235 P.2d 361, 363 (Utah 1951); Conder v. A.L. Williams & Assocs., Inc., 739 P.2d 634, 639 (Utah Ct. App. 1987) ("plaintiff in an action for fraud has the option to elect to rescind the transaction and recover the purchase price or to affirm the transaction and recover damages") (citing Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980)); Perkins v. Coombs, 769 P.2d 269, 271 (Utah Ct. App. 1988) (same and noting the choice of remedy belongs to defrauded party); Mecham v. Benson, 590 P.2d 304, 307-308 (Utah 1979) (same). The undisputed evidence establishes that Buyers were fraudulently induced to enter into the Purchase Transaction and, upon learning of the fraud, immediately issued a written notice of rescission.

Additionally, the Sellers sought (and the trial court obliged) the enforcement and protection of a contractual provision

take the remedies set forth in this Agreement and any attachments hereto. . . .[R15]

which was obtained by an affirmative and material misrepresentation that no litigation existed. A party to a contract cannot obtain a contractual provision by fraud and then seek to hide behind the protection of the provision when challenged with the fraud. As the Utah Supreme Court has expressly stated:

The law does not permit a covenant of immunity which will protect a person against his own fraud on the grounds of public policy. A contract limitation on damages or remedies is valid only in the absence of allegations or proof of fraud.

Ong Int'l (USA), Inc. v. 11th Ave. Corp., 850 P.2d 447, 452 (Utah 1993) (emphasis added). Thus, as a matter of law the fraudulently induced default provision is not a defense to Buyers' claims; therefore, the court erred in relying on this provision and granting summary judgment in favor of Sellers.

2. The "Default" Could Not Be Cured And The Default Provision Is Inapplicable.

Even if the law were ignored and the obligations and limitations set forth in the Default provision were somehow enforceable, the Default provision has no application as the "default" (i.e., the misrepresentation) could not be cured. The "default" was the existence of litigation against the Seller at the time of the Purchase Transaction despite Sellers' express representation to the contrary. This default simply could not be cured -- the litigation was in existence at the time of purchase. Accordingly, the Default provision allowing the cure of a default is not applicable as Sellers could not cure this defect brought about by their blatant fraud.

3. The Default Provision Does Not Provide Protection For Sellers As They Had Notice Of The Default.

The purpose of the Default provision was to provide the defaulting party with notice so they could effectively cure the breach. The undisputed evidence in this case establishes, however, the Sellers had actual notice of the default at the time they signed the Purchase Transaction Agreement. Despite this actual notice the Associated Factors Lawsuit was not settled for more than a year and a half after the parties entered into the Purchase Transaction Agreement. Moreover, even if actual knowledge of the default does not satisfy the technical requirement of the Default provision, the undisputed evidence shows that on September 23, 1991 Buyers sent Sellers a written notice of rescission of the Purchase Transaction identifying the outstanding litigation as the basis. [R438, 628, 868] Clearly this letter satisfied the written notice requirement of the Default provision. Despite this notice, however, the Associated Factors Lawsuit was not settled until June, 1992, more than eight (8) months after the notice. Thus, even if the Default provision were somehow enforceable and the default was curable, the undisputed evidence shows that Sellers did not "cure" the default within the thirty (30) period as required under the Default provision. Thus, the trial court's grant of summary judgment in favor of Sellers was reversible error on this basis as well.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BUYERS' CLAIM OF NEGLIGENT MISREPRESENTATION.

A. TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS THERE WAS SUFFICIENT EVIDENCE SUPPORTING BUYERS' NEGLIGENT MISREPRESENTATION CLAIMS AGAINST BOTH SELLERS AND BROKER.

Buyers' claim of negligent misrepresentation asserted against both Sellers and Broker was improperly dismissed by the trial court as all elements of a negligent misrepresentation claim were either undisputed or were established by substantial record evidence making the grant of summary judgment inappropriate in this case.

The Buyers must prove the following six elements to establish their negligent misrepresentation claim:

- (1) Defendant had a pecuniary interest in the transaction;
- (2) Defendant was in a superior position to know material facts;
- (3) Defendant carelessly or negligently made a false representation concerning them;
- (4) Defendant expected the other party to rely and act thereon;
- (5) Plaintiff reasonably relied thereon; and
- (6) Plaintiff suffered loss in that transaction.

E.g., Christenson v. Commonwealth Land Title Ins. Co., 666 P.2d 302, 305 (Utah 1993).

The record evidence before the trial court clearly demonstrated the Buyers' ability to establish each of these elements against both Sellers and Broker and summary judgment was improper.

1. Sellers And Broker Had A Pecuniary Interest In The Purchase Transaction And The First Element Was Satisfied.

There is no dispute that the Sellers were to receive the purchase price and the Broker received a commission in excess of \$10,000 in connection with the Purchase Transaction Agreement. Accordingly, both had a pecuniary interest in the transaction.

2. Sellers And Broker Were In A Superior Position To Know About The Litigation And The Second Element Was Satisfied.

Sellers, as party to the Associated Factors Lawsuit, were obviously in a superior position to know about the litigation. Moreover, the Broker was not only in a better position to know about that litigation but actually knew about the litigation and persuaded Sellers not to disclose the litigation to Buyers.

3. Sellers And Broker Negligently Made False Representation And The Third Element Was Satisfied.

The evidence before the trial court established that Sellers intentionally represented in the Purchase Transaction Agreement there was no pending litigation and Broker failed to disclose and intentionally dissuaded Sellers from disclosing the pending litigation to Buyers. Given this intentional conduct, the lesser standards of negligence and carelessness were met.

4. Sellers and Broker Expected Buyers To Rely And Act On The Representation And The Fourth Element Was Satisfied.

This element is the same as the fourth element of Buyers' fraud in the inducement claim and, as set forth supra § I.A.4. at p. 21, Sellers and Broker fully expected and intended Buyers to rely on the representation.

5. Buyers Reasonably Relied On The Representation And The Fifth Element Was Satisfied.

This element is the same as the fifth element of Buyers' fraud in the inducement claim and, as set forth supra § I.A.5 at pp. 21-22, Buyers reasonably relied on the representation in entering into the Purchase Transaction.

6. Buyers Suffered Loss As A Result Of The False Representation And The Sixth And Final Element Was Satisfied.

This element is the same as the sixth element of Buyers' fraud in the inducement claim and, as set forth supra § I.A.6. at p. 22, Buyers suffered loss as a result of the representation.

Based on the foregoing, each element of Buyers' negligent misrepresentation claim was supported by the record evidence and the trial court erred in granting summary judgment against Buyers on this claim.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON SELLERS' COUNTERCLAIM FOR BREACH OF CONTRACT BASED ON THE FRAUDULENTLY INDUCED PURCHASE TRANSACTION AGREEMENT.

The trial court in granting summary judgment not only dismissed Buyers' claims but it also summarily enforced the Sellers' counterclaim for payment of the outstanding purchase price of the business. This was reversible error as the court enforced a contract (and corresponding promissory notes) that were, based on the undisputed evidence, induced by fraud.

As a matter of law when the evidence shows that a contract has been induced by a fraudulent misrepresentation of existing material fact except for which the party would not have

entered the contract, the defendant can avoid liability under the contract. E.g., American Scale Mfg. Co. v. Zee, 235 P.2d 361, 363 (Utah 1951); Conder v. A.L. Williams & Assocs., Inc., 739 P.2d 634, 639 (Utah Ct. App. 1987) ("plaintiff in an action for fraud has the option to elect to rescind the transaction and recover the purchase price or to affirm the transaction and recover damages") (citing Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980)); Perkins v. Coombs, 769 P.2d 269, 271 (Utah Ct. App. 1988) (same and noting the choice of remedy belongs to the defrauded party and that choice cannot be forced upon him); Mecham v. Benson, 590 P.2d 304, 307-308 (Utah 1979) (same). The Utah Supreme Court's ruling is Zee is pertinent to the issues currently before the Court. In Zee the Supreme Court reversed a trial court judgment after trial to the bench. The trial court did not believe the defendant's testimony that the plaintiff's fraud had induced his entering into the contract. The Supreme Court found that defendant's testimony about the fraud, being uncontradicted, required judgment against plaintiff and in favor of defendant on the basis of rescission. As this Court explained, "the effect of such remedy is to restore all parties to the position they occupied immediately prior to the fraud." Perkins, 769 P.2d at 271.

In the instant case it is undisputed that Sellers' representation that there was no pending litigation against the business being purchased was material to Buyers and was false. Moreover, upon learning they had been defrauded with regard to litigation against the business, the Buyers promptly provided

written notice to Sellers of Buyers' intention to rescind the Purchase Transaction Agreement.¹¹ [R438, 628, 868] Given those facts it was error for the trial court to enter summary judgment against Buyers on the basis of the fraudulently induced contract.

The trial court had no power to weigh the credibility of Buyers' claim of fraud in the inducement, but only to determine if there was sufficient evidence from which a jury could conclude that the fraudulent representation had induced Buyers' signature on the contract. As shown above, such evidence clearly existed; therefore, the trial court erred in entering summary judgment against Buyers on Sellers' counterclaim in light of Sellers' fraud.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON
BROKERS' COUNTERCLAIM AND ENFORCING AN INDEMNITY
CLAUSE INDUCED BY FRAUD.

The trial court not only found that Broker could not be held liable on the Buyers' fraud in the inducement and negligent misrepresentation claims, but also summarily adjudged Buyers to be liable to Brokers because of the inclusion in the Purchase

¹¹ In addition to the letter of rescission, at the outset of this litigation in their Answer to the Sellers' counterclaim Buyers expressly asserted rescission based on fraud:

The Note which is the subject of the Counterclaim is subject to rescission given the conduct of the [Sellers and Broker] as alleged in the Complaint which is incorporated by this reference.

[R93]

While the rescission by Buyers in this case is clear, in the event there is any question regarding rescission it is a question of fact which would preclude the entry of summary judgment. E.g., Knudsen Music Co. v. Masterson, 121 Utah 252, 256, 240 P.2d 973, 975 (1952) (citations omitted).

Transaction Agreement of an indemnity clause relieving the Broker from representations or misrepresentations of the Sellers. The trial court erred, as a matter of law, in making this ruling as:

The law does not permit a covenant of immunity which will protect a person against his own fraud on the grounds of public policy. A contract limitation on damages or remedies is valid only in the absence of allegations or proof of fraud.

Ong Int'l (USA), Inc. v. 11th Ave. Corp., 850 P.2d 447, 452 (Utah 1993).

The evidence in this case showed that the Broker fraudulently failed to disclose the pending litigation and caused the Sellers to misrepresent to Buyers that no litigation was pending. The Broker's failure to disclose the Associated Factors Lawsuit gives rise to a fraud claim as, under Utah law, a real estate agent owes a duty to prospective purchasers to act honestly, ethically and competently, and is answerable at law for breaches of his or her statutory duty to the public. E.g., Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980) (citing Elder v. Clawson, 14 Utah 2d 279, 373 P.2d 802, 805 (1962)). Thus, real estate agents hired by vendors are liable to purchasers under the torts of fraud and negligent misrepresentation. Id. Thus, as a matter of public policy the indemnity provision relied on by the court in granting Broker's Motion for Summary Judgment was unenforceable to protect them from their own fraud. E.g., Ong, 850 P.2d at 452.

Additionally, under the law a party who participates in a misrepresentation is liable for the fraud though someone else does the actual talking. See Ellis v. Hale, 373 P.2d 382, 385

(1962) (party who makes misrepresentation to third party with intent it be communicated to plaintiff is liable for fraud) (citing Restatement (Second) of Torts § 553)). Thus it was error for the court to find that the indemnification provision relieved Broker of liability for their own fraud or for the Sellers' fraud which Broker expressly encouraged and assisted.

Even had Broker not acted fraudulently, the indemnification provision would not be enforceable as the Purchase Transaction Agreement is subject to rescission given Sellers' blatant misrepresentations of material facts which induced Buyers to enter into the transaction. See supra § III at pp. 29-31.¹² Accordingly, the trial court erred as a matter of law in enforcing the indemnity provision set forth in the Purchase Transaction Agreement as Buyers were fraudulently induced to enter into that agreement.

V. THE TRIAL COURT ERRED IN DENYING BUYERS' MOTION TO AMEND TO ADD CLAIM OF RESCISSION.

Prior to the trial court's decision granting Broker's Motion for Summary Judgment and prior to Sellers' summary judgment

¹² Buyers, in addition to immediately sending written notice of rescission of the Purchase Transaction Agreement to Sellers upon learning of the fraudulent inducement, pleaded rescission as an express defense to Broker's counterclaim. More particularly, in their Answer to Broker's counterclaim Buyers' third defense stated:

Any indemnification agreement signed by [Buyers] is subject to rescission given the conduct of [Sellers and Broker] as alleged in the Complaint, which allegations are hereby incorporated by reference as a further affirmative defense.

[R96]

motion, Buyers moved the trial court for leave to amend their complaint to add a claim for relief entitled "rescission and restitution". [R518-520, 586-602] The rescission claim was based on the very same factual and legal basis as those contained in the initial complaint and, in fact, the factual allegations in the amended complaint were identical to those in the initial complaint. [592-602] Buyers' proposed amendment was simply to clear up any confusion regarding the fact that Buyers were seeking rescission as previously expressed in their September 23, 1991 written notice claiming rescission of the transaction, [R628] and as expressly pleaded at the outset of this litigation in defense to the counterclaims of both Sellers and Broker. [R93 & 96]

Rule 15(a) of the Utah Rules of Civil Procedure governs amendment of pleadings and provides in pertinent part as follows:

. . . [A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

In determining whether amendment is proper, "[a] primary consideration that a trial judge must take into account in determining whether leave should be granted is whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not time to prepare." Bekins Bar V Ranch v. Huth, 664 P.2d 455, 464 (Utah 1983). The trial court erred in finding that there would be any prejudice to Broker or Sellers if the proposed amendment were allowed. The factual basis of the amended complaint was identical to that in the prior complaint and, moreover, these legal issues were present since the

inception of the case. Accordingly, no additional discovery would be necessary nor were any new issues raised.

The granting of leave to amend the complaint was particularly appropriate here because both Broker and Sellers knew that Buyers were seeking rescission of the agreement as Buyers had previously sent a written notice claiming rescission and expressly plead rescission as a defense to the counterclaims of Sellers and Broker. Accordingly, there simply is no basis upon which a court could find that the proposed amendment was prejudicial.

Finally, the requested leave to amend should have been granted because rescission was an appropriate remedy under the circumstances. As this Court has noted:

The plaintiff in an action for fraud has the option to elect to rescind the transaction and recover the purchase price or to affirm the transaction and recover damages. The choice of remedy belongs to the victim of the fraud, and a choice cannot be forced upon him.

The complaint filed by appellants pray for recission [sic] of the second subordination agreement. They are entitled to that remedy. The effect of such remedy is to restore all parties to the position they occupied immediately prior to the fraud.

Perkins v. Coombs, 769 P.2d 269, 271 (Utah Ct. App. 1988) (quoting Dugan v. Jones, 612 P.2d 1239, 1247 (Utah 1980)). Accordingly, rescission was an appropriate remedy and the trial court abused its discretion in refusing to grant Buyers leave to amend their complaint to expressly add a claim of rescission.

VI. THE TRIAL COURT ERRED IN DENYING BUYERS' MOTION FOR NEW TRIAL.

Following the trial court's decision to grant Broker's Motion for Summary Judgment, Buyers filed a "Motion for New Trial"

asking the court to reconsider its summary judgment ruling. [R712-714] The Motion was based on the fact there were material issues of disputed fact which precluded the entry of summary judgment and the trial court, as a matter of law, committed error in its ruling granting Broker's summary judgment motion. [R715-724] Given the trial court's improper legal conclusions and, more importantly, the court's basing (at least in part) its summary judgment decision on the issue of damages which was not raised by Broker until its reply memorandum, the trial court should have reconsidered its ruling by granting Buyers' Motion for New Trial. At the very least, Buyers were entitled to have the court consider the affidavits pertaining to damages which were submitted in opposition to Sellers' Motion for Summary Judgment (Sellers unlike Broker had raised the issue in its opening memorandum). Had the trial court considered those affidavits which could not have been filed in response to Broker's Motion for Summary Judgment initially as the issue was not raised, it would not have granted summary judgment in Broker's favor finding Buyers failed to prove damages. Thus, the Motion for New Trial should have been granted.

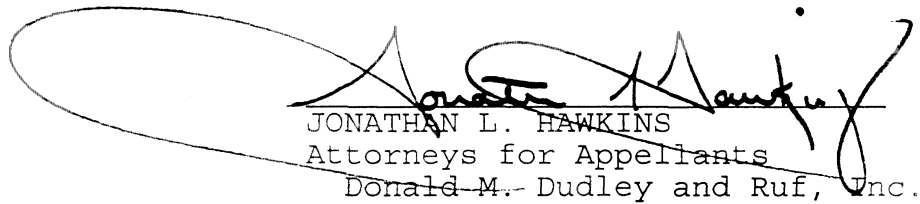
CONCLUSION AND RELIEF SOUGHT

The trial court erred in granting summary judgment on Buyers' claims for fraud in the inducement and negligent misrepresentation against both Sellers and Broker. Moreover, given the fraudulently induced agreement, the trial court also erred in granting summary judgment against Buyers on the counterclaims of Sellers and Broker, both of which were based on the fraudulently

induced agreement. Accordingly, the trial court's rulings granting summary judgment in favor of Sellers and Broker should be reversed and the case remanded for further proceedings.

DATED this 25th day of June, 1998.

ATKIN & LILJA, P.C.



JONATHAN L. HAWKINS
Attorneys for Appellants
Donald M. Dudley and Ruf, Inc.

MAILING CERTIFICATE

This is to certify that two (2) copies of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, this 25TH day of June, 1998 to the following:

Phillip W. Dyer
221 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Leslie W. Slaugh
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84603

A handwritten signature in black ink, appearing to read "Leslie W. Slaugh", is written over a horizontal line. The signature is stylized with a large, sweeping initial "L" and a long, horizontal stroke extending to the right.

appellan.bri

Tab A

FEB 26 1997

By ALAN L. CLARK
SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RUF, INC., a Utah corporation, and DONALD M. DUDLEY, an individual,	:	MINUTE ENTRY
	:	
Plaintiffs,	:	CASE NO. 930903578
vs.	:	
ICELANDIC INVESTMENTS, INC., a Utah corporation, et al.,	:	
	:	
Defendants.	:	

VR UTAH, INC., a Utah corporation,	:	
	:	
Third Party Plaintiff,	:	
vs.	:	
WILLIAM J. GRUBER, an individual,	:	
	:	
Third Party Defendant	:	

ROBERT N. JOHNSON, et al.,	:	
	:	
Third Party Plaintiffs,	:	
vs.	:	
RUF, INC., a Utah corporation, et al.,	:	
	:	
Third Party Defendants.	:	

Defendant VR Utah's Motion to Strike and Motion for Summary Judgment came on for hearing pursuant to Rule 4-501. The matter

was heard on February 24, 1997. The Court reviewed the Motion, Memorandum in Support, Memorandum in Opposition, Affidavit of Plaintiff Donald M. Dudley, and the depositions of Donald M. Dudley, William J. Tabar, Robert Johnson, Richard Johnson, Clyde E. Collier, and Pat Johnson. The Court heard the arguments of counsel and having reviewed all submissions, now enters the following Minute Entry.

1. The parties should note that no Affidavit of Donald M. Dudley has been filed in this matter, however, because the parties have each referred to said Affidavit and the relevant portions of the Affidavit are set forth in the plaintiffs' Memorandum, and referred to in VR Utah's Motion to Strike and the Memorandum in Support thereof, and the Memorandum in Opposition, the Court has treated that Affidavit as if it were filed. The Court has also reviewed the deposition of plaintiff Dudley, as set forth above.

VR Utah's Motion to Strike is denied with respect to paragraphs 30 and 31 of the Dudley Affidavit, and granted as to paragraphs 33 and 34. Said paragraphs 33 and 34 are hearsay, and not supported by any competent evidence before the Court, and therefore fail to meet the requirements of Rule 56(e).

Plaintiff has not requested any additional time in which to gather factual information under Rule 56(f). Defendant VR's Motion

for Summary Judgment is based primarily on paragraph XX of the contract between the parties. Article XX says in pertinent part that buyer is relying solely on buyer's inspection of the business and the representations of seller, and not on VR Business Brokers with regard to the prior operating history of the business, the value of the assets being purchased, and all other material facts of seller in making this offer. The paragraph goes on to state that the broker hasn't verified and will not verify any representations of seller and if any representation should be untrue, buyer agrees to look solely to seller for relief, and to indemnify broker (VR) and hold broker harmless in connection with any losses or damages caused to buyer.

In its response, the plaintiff seems to ignore the foregoing contractual provision, claiming that the plaintiff would not have entered into the contract, but for negligent and fraudulent misrepresentations by the seller and VR, and that therefore the plaintiff is entitled to rescission and the terms of the contract don't matter.

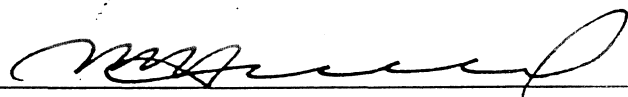
The plaintiffs' arguments have no merit for several reasons. The agreement was signed by all the parties. The plaintiff testified in his deposition that he read the agreement thoroughly and understood it. Plaintiff, through paragraph XX, expressly

assumed the risks regarding representations or misrepresentations of seller. By this provision, plaintiff expressly relieved VR of any legal duties arising from the described conduct, i.e., seller's representations or misrepresentations.

When the moving party has carried its burden under Rule 56(c), the responding party must do more than simply show there is some doubt as to the material facts. The responding party must come forward with specific facts in admissible form, showing that there is a genuine issue for trial. The plaintiff has simply failed to do this. With respect to the elements of fraudulent misrepresentation, there is no factual averment from the plaintiff establishing even arguable evidence of each of those elements. The same is true with respect to the elements of negligent misrepresentation. Plaintiff has also failed to provide any evidence of damages.

Plaintiffs' action against VR is barred by the terms of the contract, and plaintiffs have failed to meet their burden in response to defendant VR's Motion for Summary Judgment. In reaching these conclusions, the Court has viewed all submitted facts and submissions in a light most favorable to the plaintiff.

Dated this 26 day of February, 1997.



STEPHEN L. HENRIOD
DISTRICT COURT JUDGE

RUF, INC. V. ICELANDIC INVEST.

PAGE FIVE

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 27 day of February, 1997:

Clifford C. Ross
Attorney for Plaintiffs
525 East 100 South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147-0008

Leslie W. Slaugh
Attorney for Defendants Icelandic
and Johnson
120 East 300 North
P.O. Box 778
Provo, Utah 84603

Phillip W. Dyer
Attorney for Defendant VR Utah
136 S. Main, Suite 318
Salt Lake City, Utah 84101

A. Beardsley

607

Tab B

Page 1

1 IN THE THIRD JUDICIAL DISTRICT COURT FOR
2 SALT LAKE COUNTY, STATE OF UTAH
3
4 RUF, INC.,
5 Plaintiff,
6 -vs- Case No. 930903578 CV
7 ICELANDIC INVESTMENTS, INC. BENCH DECISION, 8-4-97
8 Defendant.
9
10
11 BE IT REMEMBERED that on the 4th day
12 of August, 1997, at 10:00 o'clock a.m., this cause
13 came on for hearing before the HONORABLE STEPHEN
14 HENRIOD, District Court, without a jury in the Salt
15 Lake County Courthouse, Salt Lake City, Utah.
16
17 APPEARANCES:
18 For the Plaintiff: JEFFREY L. SILVESTRINI
19 Attorney at Law
20 For the Defendant: PHILLIP W. DYER
21 LESLIE W. SLAUGH
22 Attorney at Law
23 CAT by: CARLTON S. WAY, CSR, RPR
24
25

ORIGINAL

Page 4

1 things that people don't know about that are not as
2 everybody thought they were when they put together
3 the list of representations at the start of a
4 contract?
5 I'd like Mr. Dyer to prepare orders on
6 the attorney fee motion, the motion to strike;
7 Mr. Slaugh to prepare -- oh, and the motion for new
8 trial; Mr. Slaugh prepare the motion, the order on
9 the motion for summary judgment.
10 I don't -- oh, and the motion to amend is
11 denied. Four years is just way too long, and there
12 is prejudice and there is delay and there is no
13 excuse.
14 Mr. Slaugh.
15 MR. SLAUGH: On the promissory note, the
16 Johnsons would also have a claim for attorney fees on
17 that and I would submit it.
18 THE COURT: Submit your affidavit. And
19 that -- this ruling does encompass the promissory
20 notes, so they are part of the judgment.
21 Thank you, Counsel.
22 MR. SILVESTRINI: Thank you.
23 MR. DYER: Thank you, Your Honor.
24 (Hearing adjourned.)
25

Page 2

1 PROCEEDINGS
2 THE COURT: I am going to go through the
3 motions, and I'm going to make some explanation when
4 I'm finished. With regard to the motion for
5 attorney's fees, it is granted. I'm going to want an
6 affidavit that conforms with the Code of Judicial
7 Administration. There will certainly be an
8 opportunity to object to the specifics in the
9 affidavit.
10 The motion regarding the affidavits is
11 framed as far as the motion for new trial as respect
12 to VR's concerned.
13 Motion for new trial is denied.
14 Motion for sanctions was withdrawn.
15 And Icelandic's motion for summary
16 judgment is granted.
17 And I think this was explained very well
18 by Mr. Slaugh. When a party makes a motion for
19 summary judgment and it is properly supported, the
20 burden on the responding party is a lot greater than
21 what Ruf or Dudleys have met in their response.
22 When I said wishy-washy, Mr. Silvestrini
23 -- and that's really what I was talking about --
24 Mr. Slaugh talked about clear and convincing
25 evidence. It is clear to me from reading the

Page 5

1 REPORTER'S CERTIFICATE
2 STATE OF UTAH } ss.
3 County of SALT LAKE)
4
5 I, CARLTON S. WAY, CSR, do hereby certify
6 that I am a Certified Shorthand Reporter and a Notary
7 Public in and for the State of Utah;
8 That I took down the proceedings aforesaid at
9 the time and place therein named and thereafter
10 reduced the same to print by means of computer-aided
11 transcription (CAT) under my direction and control;
12 I further certify that I have no interest in
13 the event of this action.
14
15 WITNESS MY HAND AND SEAL this the 6th day of
16 August, 1997.
17
18 (Signature)
19 CARLTON S. WAY, CSR, RPR
20
21
22
23
24
25

Page 3

1 affidavits and the deposition that Mr. Dudley did not
2 rely on it. He likes to talk about reliance, but
3 he's got to bring to court admissible facts showing
4 that we've got a case to try. And that's where
5 Silatex (phonetic) and its progeny as affirmed by
6 Utah Supreme Court cases... And the fact that the
7 Plaintiffs needed to bring to this Court to survive
8 these motions simply were never even proffered. And
9 that's absolutely true with the damage issue. That
10 was raised. That was before the Court. And there
11 hasn't been even an intimation regarding the kind of
12 specific types of damages that would have to be
13 raised again to survive this motion. Plaintiff has
14 simply failed to make even a prima facie case of
15 fraudulent inducement. It takes more than just
16 evidence in the record.
17 I think the contract provision regarding
18 notice and cure is essential to any analysis of this
19 case, and it is also clear that the Plaintiff
20 completely ignored that provision. That provision
21 was there for exactly this kind of case. And I think
22 that cuts right to the core for the argument for
23 fraudulent inducement. Why is this provision in the
24 contract if the parties didn't acknowledge that there
25 are sometimes things misrepresented, omitted or even

FILED DISTRICT COURT
Third Judicial District

AUG 6 1997

SALT LAKE COUNTY

By A. Beaulieu Deputy Clerk

1004